within ten years. However, if high-speed data transmission could occur through other means, the Agreement does not prevent this from occurring. Agreement, Section 11.1(a).[6]

Another key concern over the ten-year period is whether there will be sufficient fiber capacity available in the relevant market.[7] As has been shown, there is already excess capacity in the State of Minnesota and there is excess capacity along the routes on the freeway. Current and planned fiber capacity paralleling freeway rights-of-way as compiled by KMI, Corporation (Exhibit 3, Attachment D) provides all of the evidence needed to show that fiber development will continue undeterred. The Missouri experience confirms this fact. In addition, advances in laser technology will continue to exponentially increase the capacity of deployed fiber.

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[6] Many parties also questioned the Agreement's seemingly contradictory requirement of exclusivity with respect to fiber, but not for other types of utility placements. The Agreement, at Section 3.1(b)(iii) states that the rights granted Developer are limited by:

> the paramount right of MnDOT to possess, control and utilize the right-of-way . . . including but not limited to the right to grant permits to others pursuant to the Utility Accommodation Policy.

Telco Opponents argue that this means the State reserved the right to allow natural gas pipelines, electric power lines and others on the freeway right of way. The Agreement does allow these other utilities as well as other fiber providers the ability to access freeway rights-of-way for perpendicular crossing of the freeways, consistent with the Utilities Accommodation Policy. Nothing in the Agreement suggests that these other utilities will be placed longitudinally along freeway rights-of-way.

[7] To the extent that there were any validity regarding fears of capacity constraints during this time, it should be noted that existing fiber providers would be permitted to charge higher prices, not just Developer. Developer's fiber with exclusive physical access will constitute only a small portion of Minnesota's fiber miles. This is a normal market response to a scarce resource situation. The Telco Opponents have repeatedly argued that Developer is the sole beneficiary of higher prices in this type of market. For example, the MTA states: "There are no limitations on the company's ability to raise its prices to exploit the added value of remaining capacity as the supply of available capacity diminishes. Of course, if other providers were not prevented from use of the freeways, there would be no scarcity to exploit." MTA Opposition, p. 39. This assumes that all existing and new traffic will run over Developer's facilities. To the extent there are capacity constraints due to rights of way access (and there are not), this problem will occur sooner and be exacerbated by the fact that the State did not expand available rights of way to Developer and collocated providers.

The Affidavit of Dr. Pearce provides a convincing Macro view of the market for voice, video and data transmission capacity. Major entities are in the process of creating national fiber networks and will be undeterred in supplying capacity in Minnesota simply because of Developer's use of freeway rights-of-way. For example, Williams Power has plans to expand its 11,000-mile network to 32,000 miles. Intermedia Communications, Inc. (ICI) plans to purchase approximately 14,000 route miles on the Williams network. Qwest plans to connect over 125 U.S. cities with 16,000 miles of fiber. Level 3 plans a 13,000 mile fiber optic network. PSI Net recently purchased the right to use 10,000 route miles of fiber from IXC Internet Services, Inc. The transition of the circuit switched network to a packet switched network makes these Internet-based fiber routes capable of handling voice, video and data transmission, greatly expanding the supply of fiber capacity within the State and the nation. Exhibit 4 (Affidavit of Pearce).

The Commission has the ability to determine that the market for competitive alternatives will not disappear in ten years based on the State's showing regarding current levels of capacity, ease of upgrade, trends in fiber deployment, and alternative rights of way, including state trunk highway rights of way. The Telco Opponents' concerns about uncertainty and the speculative, potential harm based on unknown events should be dismissed as pure conjecture.

The Commission can examine these national trends and review the activity occurring in Minnesota and determine that a ten-year agreement to limit exclusive physical access will not lead to supply constraining or jeopardize the growth and development of competitive alternative fiber transmission paths.

E. Contract Terms Are Not Evidence of Market Power.

Many opponents have argued that because the Developer was willing to grant the State "free" capacity and because it did so, it must mean that it will be able to obtain market power. MTA consultants Strategic Policy Research, Inc. uses a different fact to establish market power. They note that the Agreement would not contain protections such as the duty to lease at non-discriminatory prices unless the Agreement conferred market power on Developer. Finally,

USTA, et al. note that exclusivity must be valuable and that value must mean Developer will be able to recoup above market prices because the Developer has a right to terminate the Agreement in the event there is no exclusivity.

None of these facts evidences market power and such conclusory analysis of a market would never be accepted as evidence in a regulatory approval of a merger or antitrust proceeding. There is no basis to say that market power exists because of the decisions made by two contracting entities. The Telco Opponents presume that a premium was paid because the State received in-kind service in the form of free capacity. There is no dispute that the State's right-of-way has value. There is also no dispute that the Developer will attempt to recover its costs, including its cost of obtaining the right-of-way. This is not evidence of market power. Developer has no guarantee of such recovery. Developer will compete for traffic with entrenched incumbent LECs and their affiliates, other "mature" entrants who have excess capacity as well as entities who are installing fiber capacity at present such as Qwest, Dakota Telecommunications , and Cooperative Power Association. As MTA representatives have noted, there is currently excess capacity and all it takes to expand it is installation of new electronics. This is confirmed by the Rebuttal Affidavit of Bhimani. Developer made a business decision to enter an extremely competitive market. No entity will "be forced" to lease capacity at above market rates or to construct collocated capacity at above-market prices.

No party has presented any serious discussion as to why a market that has developed with incredible speed over the past decade without access to freeway rights-of-way will come to a screeching halt and face supply constraints providing Developer the ability to charge above-market rates. Indeed, the State has provided specific factual evidence that demonstrates such an occurrence will not result from the Agreement. In addition to the evidence of existing and new entrants, as well as excess capacity, the State has identified in its Petition new entrants such as Qwest, DTI, and Minnesota Power that either plan to install, or are now making available, additional fiber capacity within the State. Alternative rights-of-way deemed unrealistic by the opponents, such as railroad rights-of-way, are being utilized by Qwest to install fiber optics. In

addition, Cooperative Power Association and Minnesota Power are assuring that fiber in their electric power line rights-of-way is being leased.

This analysis does not even include alternative transmission such as satellite and wireless, all of which are converging and becoming more substitutable with each passing day. Indeed, as the State has shown, it has taken a very narrow view of the relevant product market. Exhibit 4 (Pearce Rebuttal Affidavit). Developer's decision to compete in this market by offering value to the State does not evidence market power concerns.

Neither is the fact that the contract includes a non-discriminatory rate provision evidence of market power as indicated by the MTA. The State insisted on additional protections that is believed conformed with the policy objectives set forth in the Telecom Act. Strategic Policy Research, Inc.'s baseless conclusory speculation cannot be seriously considered as evidence of market power.

Finally, the fact the Developer reserved the right to terminate the Agreement if no exclusivity is awarded is not evidence that it assumed it would obtain market power. Developer proposed to provide the State fiber capacity based on a grant of exclusivity. If that is not the bargain, the Developer prudently reserved the right to terminate. When the terms of a deal are required to change, one option is for the parties is to walk away. The existence of this option does not provide evidentiary support for the inherent value in exclusivity resulting in a significant competitive advantage. Interestingly not one party referenced the Agreement's provision allowing the State to terminate the Agreement in the event the exclusivity provision is not enforceable. As will be discussed in Sections V and VI, the State was insistent on the right to terminate in the event of a judicial ruling not permitting exclusivity because the State will not allow multiple entities to construct facilities on the freeway rights-of-way at regular intervals. Rather, it will , as it has in the past, bar longitudinal placement on total. Exhibit 1 (Affidavit of Commissioner Denn).

F. Failure To Include Specific Contract Terms Are Not A Cause For Concern.

The Telco Opponents have listed a parade of horribles that they argue may occur as a result of the Agreement. Many of these concerns relate to the potential for affiliate abuse. Others relate to the fact that Developer will have leverage and the ability to unfairly harm entities wishing to collocate or lease or purchase capacity. As will be seen through this discussion, all of these concerns rest implicitly or explicitly on the premise that Developer has market power. As has been fully described above, this is not the case and the Commission should not be concerned about these claims of inadequate safeguards or protection.

1. Developer must charge market prices.

USTA, et al. suggest that the Agreement is insufficient as there is no requirement that the Developer charge fair and reasonable rates. Nextlink notes that there are no restrictions on the level of rates that would be charged and that Developer has an incentive to engage in anti-competitive pricing. MTA suggests that anti-competitive prices will result from capacity constraints. RCN notes that a sole seller where there is no good substitute can maintain a selling price of above market levels and that there is no competitive pressure for Developer to keep prices down.

The State is mystified why these organizations have made mere conclusory assertions to the Commission without providing any factual analysis of the market power issues. The record is replete with evidence that the Developer cannot exert market power. The admissions of MTA's representatives speak for themselves. Fair and reasonable prices are best determined by competitive markets. There is intense competition for fiber based transmission and Developer will be simply one of many providers within the State from whom to purchase or lease capacity. Significant alternative rights-of-way will provide for continuous entry opportunities. The market will assure that Developer cannot engage in anti-competitive pricing behavior. Exhibit 4 (Affidavit of Pearce).

2. Concerns about affiliate abuse are misplaced.

Most Telco Opponents voiced concerns that Developer will favor its affiliate. Section 7.4 references affiliates as a prophylactic measure to assure that affiliates are treated similarly to

others. The Commission should not be concerned because Developer has no business plans to create an affiliate. Exhibit 5 (Affidavit of Strock). This prophylactic effort has caused incredible consternation among the Telco Opponents.

Nonetheless, there is no need to fear this contract term. First, affiliate abuse only occurs when market power is involved. This is why the Commission has carefully scrutinized activity of incumbent LECs and required structural separation of their affiliates while not imposing similar conditions on their competitors. Exhibit 4 (Affidavit of Pearce). In a market with multiple providers and excess capacity it is impossible to favor your affiliate in a manner that could harm competition. Market forces will discipline the Developer to make collocation available and provide high-quality service to collocating entities. As Mr. Bhimani notes, the opposing telecommunications firms are sophisticated and will assure that they obtain the service deserved. Exhibit 3 (Bhimani Rebuttal Affidavit).

Notably, MFS, which has exclusive control of conduit on the New York freeway, has entered agreements with its parent WorldCom as well as other entities and no entity has alleged concerns over anti-competitive conduct. Thus, it is surprising that MFS and others are concerned over the lack of enforcement capability of the non-discrimination provisions. Once again, the issue of enforcement is not a concern as the market will act to protect collocating customers. In addition, contract covenants do have meaning and it can be expected that parties to an Agreement will perform in accordance with the contract. Finally, to the extent that the non-discrimination provisions are a condition of declaring that the Agreement is consistent with the Act, the Developer would be foolish not to comply.[8]

3. The inability to maintain facilities is common in the fiber market.

The Telco Opponents argue that the contract provisions which allow the Developer to maintain equipment will create competitive problems. This situation is not unique. Competitors

[8] The State is not seeking, nor could it seek, a Declaratory Ruling that implementation of the Agreement is consistent with the Telecom Act.

in the fiber market routinely swap capacity and allow others to control their facilities. Exhibit 3 (Bhimani Rebuttal Affidavit).

TCG argues that access to TCG equipment by non-TCG personnel could conceivably void equipment warranties and invalidate the proprietary and confidential nature of TCG's network. Comments of TCG, p.12. TCG also states that it is efficient to manage its own facilities. Id. at p.14.

Yet, in Maryland, TCG apparently had no concern in letting one of its major competitors, MCI, maintain fiber it owns and which is collocated with TCG fiber on the Maryland freeway right-of-way. See Exhibit 7. MFS maintains facilities on the New York Thruway and this has not stopped entities from deploying their own fiber.

RCN and Nextlink argue that there are no protections against delays in installation of equipment, poor maintenance or other service delay tactics. Again, these same issues apply throughout the fiber market and are resolved by the competitive nature of the market that allows entities to swap capacity and entrust maintenance to a single entity. The Commission should not be distracted by these fictitious concerns.

G. This Is A Case Of First Impression And The Legal Precedents Of The Commission Do Not Support A Finding Of A Violation of 253(a).

The Telco Opponents have consistently cited Commission precedent for propositions that are wholly inapplicable to this case.

Several Telco Opponents have argued that the agreement is invalid because it will force new entrants to lease capacity. Opponents have cited the following language of PUC of Texas in support of that position:

> We find that Section 253(a) bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell relevant LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.

PUC of Texas, para. 74.

What not one petitioner mentions is that in PUC of Texas, the Commission preempted a mandatory build out requirement that would have required AT&T, Sprint, and MCI to enter the local market through the use of their own facilities.

There is no prohibition in the State of Minnesota on facilities-based entry as is implied by opponents. Nor is there any effective prohibition to facilities-based entry. As stated previously, Qwest will enter Minnesota via railroad rights-of-way. Wiltel initially entered the market utilizing natural gas pipeline rights-of-way. Minnesota Power has recently announced plans to enter the fiber market using fiber placed on electric power line rights of way. CPA and UPA will construct fiber facilities utilizing power line rights-of-way. Finally, entities can decide to construct facilities through collocation opportunities. The alleged inverse of the problem in PUC of Texas that a new entrant will "be forced" to lease rather than install facilities from Developer and, therefore, not have a choice as to how to enter the market simply does not exist here. Moreover, entities choosing to lease rather than build will have many fiber providers to choose from. Unlike PUC of Texas, no entity will be forced or effectively foreclosed from entering the market as they choose.

Similarly, the Telco Opponents cite the following language from In the Matter of Silver Star Telephone Company, CCB Pol. 9702, Memorandum Opinion and Order Released: September 24, 1997 at 12 FCC Rcd. 15639 ("Silver Star") in support of the proposition that a ten-year exclusive arrangement is per se violative of Section 253.

> Section 253 does not exempt from its reach State created barriers that are scheduled to expire several years in the future. In any event, a "temporary" ban on competition that lasts for a minimum of nine years and a maximum of twelve years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition.

Silver Star, 12 FCC Rcd. at 15657, ¶ 39.

Silver Star involved an outright prohibition on competition for local exchange service for a period of nine to twelve years adopted by the Wyoming legislature prior to enactment of the 1996 Act. There is simply no such outright ban on competition in the fiber market, nor is there

any effective prohibition in this case. As such, the term of the grant of exclusive access is not presumptively invalid, as alleged. Indeed, the time frames of ten years and nine to twelve years are the only similar facts between these cases. Unlike the Wyoming statute which forbid competition for nine to twelve years, there will be vigorous competition in the market for fiber transport capacity within the state for the ten-year period during which Developer has exclusive physical access to the rights-of-way. This competition will occur as a result of existing networks, collocation opportunities, lease and purchase opportunities and new development in cost-effective alternative rights of ways. Thus, the grant of exclusive physical access for a period of ten years is not in any way similar to the prohibition in Silver Star.[9]

New England Public Communications Council Petition for Preemption, Memorandum Opinion and Order, CCB Pol. 96-11, released April 18, 1997 ("New England") is cited for the following proposition:

> We find that requiring payphone providers to provide local exchange services in order to be eligible to offer pay phone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the cost and other burdens of providing pay phone services, thus deterring the entry of potential competitors.

New England, para. 20.

The critics argue that the Developer will maintain a material cost advantage and that this acts as a cost burden on other providers. However, there is no similarity to the regulatory cost burden imposed in New England and the alleged cost differences here. First, it is important to note that this language was utilized in finding that the regulation was not competitively neutral pursuant to Section 253(b), not that it caused a violation of Section 253(a). The 253(a) violation

[9] Oddly enough, MFS vigorously opposes the project but attempts to shield its exclusive contract with the New York Thruway Department to install fiber in the State of New York by noting that pre-act agreements are not impacted. Comments of MFS, Eide Affidavit. If the Commission finds the state requirement invalid, similar pre-act state requirements which supposedly prohibit competition are not protected by the 1996 Act. That is the point of Silver Star. The State does not believe such a contract is invalid but MFS cannot have it both ways.

occurred as a result of a ban on entry. Further, Telco Opponents are forced to concede that collocating customers are not subject to this alleged cost disadvantage. Unlike New England, where a regulatory authority selected a type of service provider and singled it out for more burdensome treatment, collocation opportunities are open to all comers and thus it is competitively neutral.

The fact that timing concerns and current needs for capacity may benefit any given provider and not others, does not create a suspect class of providers who are treated unfairly. The State could not possibly identify any entity that it is intending to disadvantage as all entities can avail themselves of the collocation opportunity. The State's RFP was likewise open to all. Further, the State has no regulations which burden existing providers of capacity nor are there any regulations that impose burdens on new entrants utilizing alternative rights-of-way to develop their own networks. To the extent that an alleged cost burden can be a basis for a Section 253(a) violation, the Commission should recognize that here, current cost-effective alternative rights-of-way exist, such that there is no material impairment of the ability of firms to compete in a fair and balanced legal and regulatory environment. The experience of Missouri and the continued deployment of network infrastructure in Minnesota even after issuance of the RFP confirm this fact.

H. The State's Decision Facilitates Competition As Required By The Act.

The MTA and others question "how competition is enhanced by allowing exclusive access to the best right of way to a single provider as compared to offering these cost advantages to all providers." MTA Opposition at p. 31.

The answer is simple, and it is one Telco Opponents refuse to accept. The freeway rights of way have been free of longitudinal placement for 40 years. Minnesota, along with other states such as Washington, Maine and Montana, and many others believe that the appropriate balance of promoting ITS, protecting public safety and enhancing competition is to open the right of way area under very controlled circumstances. These controlled circumstances allow one entity to

construct fiber on behalf of many firms. In fact, MTA's own experts, Strategic Policy Research, state:

> As a means of minimizing disruption, it is also reasonable for the State to encourage other parties who currently need capacity along these routes to contract with the Developer to install fiber for them at the same time the Developer is installing fiber for the States.

MTA Opposition, Exhibit 3, p. 4.

Commissioner Denn has made it clear that as the state official charged with managing the right of way resource, he will not make the freeway right of way subject to a permit process for longitudinal placement. Construction must be infrequent and when it does occur, it is reasonable for the State to require, rather than merely encourage, parties who need capacity along these routes to contract with State's construction contractor. Exhibit 1 (Denn Affidavit). Thus, when faced with the choice of an exclusive physical grant of access which operates in a functional non-exclusive manner with clear opportunities for others to provide service via their own facilities, as well as to purchase dark fiber or lease lit capacity, the theory of second-best alternatives clearly makes this the pro-competitive choice portrayed by the State. MTA and others all assume that something that will not happen either could or should happen, which is to allow multiple entities access to freeway rights of way at regular intervals such that all telecommunications carriers' demands for placement are satisfied.

The Commission cannot require states to open freeway rights of way to a permit process. Minnesota's Commissioner of Transportation has stated he will not allow a permit process on the rights-of-ways, nor will he allow multiple construction entities to operate at the same time. As such, where the choice is some fiber placement or none, if the allowance of placement can, as is the case here, accommodate the Commission's goals of adding competitive providers while assuring a fair and balanced legal and regulatory environment, it should be declared consistent with the Act.

I. Summary.

The State has fully met its burden of showing that existing providers can continue to offer telecommunications service (surely the exclusive grant will not cause them to close down their existing facilities); the State has shown that cost-effective alternatives exist for new entrants wishing to place fiber in the future; finally the collocation opportunities and the Developer's need to obtain collocators as part of their ability to make the project a success show that these are not false promises but very real ways in which firms can enter the market today. As such, the Commission has sufficient unrefuted evidence in the Initial Petition, supplemented by the State's Reply Comments, to allow it to declare that the limited grant of exclusive physical access to Developer operates so as to be functionally non-exclusive and is consistent with Section 253(a).

V. THE STATE HAS DEMONSTRATED THAT EXCLUSIVE PHYSICAL ACCESS IS NECESSARY TO PROTECT PUBLIC SAFETY CONSISTENT WITH SECTION 253(b).

Even assuming that the Agreement violates Section 253(a), the Agreement is saved by Section 253(b). There are three fundamental concerns with respect to Section 253(b) of the Act. The first and most important issue is whether the grant of exclusive physical access is a public safety concern. If it is, then the second issue is whether the requirement is "necessary." Finally, if the requirement meets the public safety criteria and is necessary, then it must also be competitively neutral.

A. The State Has Provided Factual Support For Its Claim That Public Safety Requires Limitations On Freeway Access.

Most parties agree that the State has legitimate public safety concerns which arise from allowing access to the freeway rights-of-way. Some entities, however, are cavalier in their analysis of the public safety issue. For example, KMC argues that there should be no problem in using a permit process for State trunk highways because these State trunk highways share the same attributes of freeways. Comments of KMC, p. 7. RCN argues that public safety concerns

are overstated because the Agreement does not allow work to occur anywhere near a paved surface. Comments of RCN, p. 12.

These same statements could have been made about freeway safety prior to 1989, when longitudinal placement was not permitted by FHWA. As described in the Petition and in Exhibit 2, the purpose of this FHWA restriction was to assure the safety and convenience of the traveling public. No party has directly stated that the State could not continue with its current utility accommodation policy and deny all longitudinal placement as necessary to protect public safety. Thus, it is difficult to fathom how allowing entry under restricted circumstances does not meet the same public safety test.

Nonetheless, the State will explain in detail what it thought was relatively obvious from the history of the FHWA and AASHTO documents: protecting public safety and convenience of the traveling public requires restrictions on access to freeway rights-of-way for construction purposes. The State's decision to limit the amount of construction on freeway rights-of-way to a single placement opportunity for a ten-year period is necessary to minimize disruptions that occur as a result of construction activity. The decision to require that construction be handled by a single entity is also necessary to minimize distraction and disruption during construction.

1. Factual context of FHWA and AASHTO policies.

Several parties have cited to AASHTO and FHWA policies as evidence of the fact that public safety and convenience does not require exclusive physical access to the freeway rights-of-way.[10] The parties have taken these policy documents out of their broader context. MTA also indicated that because Ohio, Iowa and possibly Kansas are doing non-exclusive arrangements, that Minnesota is wrong in asserting public safety and convenience concerns.

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[10] See Opposition of MTA; Comments of MFS.

The parties rely on documents that state that is now permissible to place longitudinal utility placements on freeway rights-of-way and from these documents, conclude that public safety concerns do not necessitate limitations on access.

For example, MTA states that FHWA no longer requires limited longitudinal access and allows states to determine whether to allow use. It conveniently tucks away in a footnote the directive of FHWA in § 1.1.2 of the 1996 FHWA Guideline, which states: "If a state chooses to allow utilities along interstates, it must ensure that safety is not affected." (Emphasis added.)

Further, it is argued that the American Association of State Highways and Transportation Administrators ("AASHTO") does not require exclusive use. Opponents cite to the 1995 AASHTO resolution which deemed it permissible to permit longitudinal use of freeway rights-of-way. See, e.g., MTA Opposition, p.45.

These documents made no conclusions as to how individual states should proceed with this permissive language. For example, the AASHTO Task Force on Fiber Optics and Transportation Rights-of-Way, notes: "Safety considerations should always be emphasized." Guidance on Sharing Freeway and Highway Rights-of-Way for Telecommunications, p.20. See MTA Opposition, Exhibit 5. None of these documents indicate that freeway trenches should be opened on a continuous basis through a permit process. Nor do they indicate whether safety is better managed by allowing one firm access rather than many. What they do highlight is that public safety issues remain of primary concern in any grant of longitudinal placement. Thus, these documents support the State's case with respect to the necessity of restricting access to promote public safety.

Finally, MTA notes that because Iowa and Ohio allow non-exclusive access, public safety does not require exclusivity. If this is evidence of what public safety requires, then so is the fact that at least 23 states, ten years after the FHWA ban, still do not permit longitudinal placement

on its right-of-way is even stronger evidence of public safety concerns.[11] The overwhelming majority of the states currently do not allow for longitudinal access of utilities. It is not unreasonable for the State to present the Commission with the choice of no access or limited, exclusive physical access. It is well within the realm of reasonable choices, reserved under the State's traditional police powers, currently being exercised by the various states.

2. Multiple entry increases safety risks.

Many commentors recognized the State's legitimate interest in protecting public safety and managing freeway rights-of-way. However, these parties did not believe that the State met its burden of proof on this issue. Some commentors, such as RCN and ALTS, suggested several items which the State failed to explain.

Although the burden that the State must meet is a subject of disagreement, the State will articulate, from the perspective of a highway engineer, the very real concerns related to multiple placement.

Unlike other cases where public safety was asserted before the FCC, no affidavits from an engineer with 20-plus years of traffic management experience was presented. See Petition; Affidavit of Lari. The Petition provides sufficient factual support for the Commission. In addition, Chief Engineer Durgin provides 30-plus years of highway engineering experience. See Exhibit 2.

Mr. Durgin attests to the fact that there are three separate and distinct safety concerns. The first is the need to control the frequency with which construction will occur. This control should be limited to a single one-time placement of fiber at infrequent intervals so as to minimize safety risks to the traveling public. Exhibit 2 (Durgin Rebuttal Affidavit). Construction activity places additional vehicles and personnel in the rights-of-way and leads to driver distraction. Distracted motorists cause disruption which leads to accidents. Significant construction activity

[11] MnDOT staff conducted a telephone survey during March of 1998. Of 31 states contacted, 23 did not allow for any longitudinal utility access on their freeway rights-of-way. Exhibit 8.

of the type pictured in Exhibit 2, Attachment C will increase vehicle slow-downs and speed disparities and, in turn, increase accident probability. Id. The State is fully aware of the risks associated with work zone activity. Over the past five years there have been more than 11,000 street and highway work zone crashes in Minnesota. Work zone crashes have resulted in over 5,500 injuries and killed 64 people. Exhibit 2 (Durgin Rebuttal Affidavit).

On some areas of the freeway, the State will need to set up lane closure activity to protect workers installing equipment and to protect the traveling public. As can be seen in Exhibit 2, which shows fiber construction activity along the New York freeway, lane closures were required for construction of fiber facilities.

A 1996 Transportation Research Board study of work zone crashes showed that for 29 rural freeways involving traveled way or detour work zones, these zones experienced an increase of 41.3 percent in total accident rate and of 30.7 percent in fatal and injury accident rate during the construction period. The results of urban freeways showed that total accident rate increased by 34.2 percent and fatal and injury accident rate increased by 29.7 percent during the construction period. For ten urban freeway sites where the work zone activity involved shoulder and roadside work zones, the total accident rate increased by 10.1 percent and the fatal and injury rate increased by 21.9 percent. There was insufficient data to draw a conclusion on rural shoulder and roadside work zones. Procedures for Determined Work Zone Speed Limits, Research Results Digest, September 1996, Number 192. The State does not claim that construction of fiber in the freeway rights-of-way will lead to these levels of increase. Rather, the State wants to make sure that the Commission understands that there is ample factual support for its public safety concerns about construction activity, in rights-of-way.

Transportation managers know that road work leads to distraction, speed flow disruption, greater accident rates, and yes, higher fatality rates. Telco Opponents that demand a permit process because the State has failed to articulate the necessity of public safety concerns have abdicated their sense of public accountability. Freeways were not designed to accommodate longitudinal utility placement and the accommodation of this use must be limited. Freeways are

unique roadways. They handle high traffic volumes at high speeds and are designed with fully controlled access and less frequent interchanges, grade separations at intersections, broader clear zones to maintain visibility and recovery of errant vehicles, broad shoulders and ditches intended to accommodate safety for high traffic volume and speed. As a result of the different nature and design and use of freeways, the safety considerations for them are more rigorous than for other roadways such as state trunk highways. Exhibit 2 (Durgin Rebuttal Affidavit).

The second safety risk identified is the manner in which any construction occurs. It simply makes no sense whatsoever from a public safety perspective to allow multiple entities to engage in construction activities at the same time. This will either add additional vehicles and personnel on the rights-of-way creating further distraction and disruption or it will cause an extension of the time over which placement of facilities occurs.

As Strategic Resources, Inc. noted, it was not inappropriate for the State to encourage collocators to utilize Developer for construction of facilities. MTA Opposition, Exhibit 3. The State, however, is not relegated by Section 253 to encourage results which will protect public safety. Rather, the State has the full police power rights that existed pre-Act to require such coordination to ensure that public safety is maintained.

The final risk is the risk of multiple entities entering the rights-of-way to maintain facilities. Opponents criticize the State's plan for requiring a single entity to coordinate maintenance and repair activity. They argue that because fiber is relatively undisturbed, maintenance activity should be minimal. However, maintenance is not a planned activity and can be required at any time. By allowing multiple entities to place fiber in the freeway rights-of-way, it is likely that a fiber cut would affect more than one of those various providers' facilities. Allowing multiple entities to enter the restricted freeway rights-of-way and engage in repair and maintenance activity is neither efficient nor safe. The greater the level of activity in the rights-of-way, the more likely to distract drivers and disrupt traffic. This is even more important given that maintenance and repair work is rarely scheduled and this requires assurance that the entity or entities entering the freeway rights-of-way are fully aware of MnDOT safety procedures

and requirements. Allowing one firm to maintain facilities is a normal practice and is an uncontroversial part of New York and Maryland's freeway fiber deployment strategy. Exhibits 2 and 3 (Durgin and Bhimani Rebuttal Affidavits); Exhibit 7.

B. Section 253(b) Requirements Have Been Fulfilled.

As most commentors agreed, the Commission has determined that if a law or requirement violates Section 253(a) considered in isolation, it then determines whether the requirement nevertheless is permissible under Section 253(b). PUC of Texas, para. 42. In order to be saved under Section 253(b), the law or requirement must meet one of the enumerated criteria, be necessary, and competitively neutral.[12]

The Telco Opponents make three main arguments. First, they argue that to the extent public safety is at issue, the requirement is not "necessary" to protect public safety. Opponents cite New England at para. 22 for the proposition that the State has not demonstrated that other methods short of a flat prohibition are insufficient to protect the interests of the traveling public and transportation workers. Second, critics argue that the State has chosen the most restrictive alternative by requiring exclusive physical access. Finally, even if the requirement is necessary, it is argued that it is not competitively neutral.

The Commission should utilize the factual support in the Petition, and the additional support provided in Section V. A., as well as a dose of common sense which has been recklessly

[12] MFS argues that the requirement must also be consistent with Section 254. It states that the State's Petition must fail because it does not address this point. MFS claims that because the Developer will be providing advanced services to outstate Minnesota, this is a form of universal service which cannot be funded except on an explicit subsidy program. This novel argument is off-base for several reasons. First, the term "consistent with" does not require a discussion of how the State's exercise of its police power rights regarding public safety promote or advance Section 254 universal service goals. When Section 254 is not affected by the state law or requirement, as is the case here, there is no need to explain that the requirement does not interfere or conflict with Section 254. Second, this is a state procurement which has the benefit of bringing additional fiber capacity to outstate areas. That can hardly be characterized as an implicit subsidy. Finally, the Commission has determined that high-speed transmission is not a covered service subject to universal service funding. See Universal Service Order, Docket No. 96-45, FCC 97-157, released May 8, 1997. Thus the entire discussion is irrelevant.

abandoned by the Telco Opponents, to state clearly that, there is a legitimate public safety concern sufficient to justify a grant of exclusive physical access for longitudinal placement of fiber on freeway rights-of-way. As will be discussed below, the State requirement is both necessary and competitively neutral.[13]

1. The State requirement is necessary to protect public safety.

The Telco Opponents assert that the State cannot demonstrate the necessity of the limitation on access because the State's true motivation was to have a private network built at no cost or to obtain a higher bid. Opponents also argue that the State must show that alternatives to its approach cannot be found that would also protect public safety. See e.g., Opposition of USTA et al. Others note that because a few states have decided that exclusive access is not necessary (e.g., Ohio and Iowa) that Minnesota cannot succeed in meeting the necessity requirement. Opposition of MTA.

These comments misconstrue the appropriate standard that the Commission should apply when a state or local government engages in the exercise of its traditional police power functions.

The Telco Opponents note that the Commission has stated "that a relaxed interpretation of the term 'necessary' is inconsistent with Congress' purpose of removing regulatory barriers to entry in the provision of telecommunications service. New England, para. 21. In New England, the Commission was confronted by actions of the State's utility regulatory agency that adopted rules which constituted economic barriers to entry. This type of economic entry regulation is the suspect class of Section 253 and those types of state actions should receive strict scrutiny and meet a narrowly defined test of necessity. Here, the Commission is reviewing the reserved

[13] In its examination of Section 253(b) the Commission is entitled to examine the degree and extent of the 253(a) violation in weighing whether the requirement can be saved under Section 253(b). Section 253 inherently includes a balancing of competing interests and the Commission should not place any of the competing policies above the other but balance these factors to assure a reasonable result.

police powers in a petition by the State's transportation authority that has no ability or authority to create generalized barriers of the sort found in New England.

The standard that should be considered in this context is not whether a regulatory agency with the same expertise in telecommunications matters as the Commission's has shown that there are other less restrictive alternatives. Rather, in the context of public safety decisions made by state or local entities with specialized expertise regarding various public safety issues, the Commission should be satisfied that the law or requirement is reasonably necessary to protect public safety.

If the Commission begins second-guessing the traditional public safety decisions of states and municipalities, it will find itself embroiled in matters that do not enhance the overall pro-competitive objectives of the Act. For example, decisions by local police authorities to remove payphones in particular areas affected by drug traffic could be challenged on the basis that a less restrictive alternative, such as limiting calls to two or three minutes, would adequately protect public safety. The fact that one jurisdiction has moved to time limits on calls while another pulls the phones out should not be sufficient for the Commission to conclude that a requirement to remove certain payphones is not necessary. States' traditional police power functions should not be diminished to the lowest common denominator or states' tenth amendment powers will be unintentionally abridged.

Nonetheless, even under the more stringent standard, the State has demonstrated that there are legitimate public safety issues involved in the construction of fiber on freeway rights-of-way which necessitate the state requirement. It is necessary to restrict access by telecommunications firms so that construction takes place infrequently and that risks are reduced during construction. The decision to allow a one-time entry for a period of ten years via a single construction entity is necessary to protect public safety as it will minimize accidents, injuries and fatalities.

The Telco Opponents assert that the State requirement fails the necessity test because it creates a flat prohibition on access. Unlike New England, the State's requirement is not a "flat

prohibition" on access. Collocating customers will be able to choose the fiber, locations and architecture desired. These collocating customers' ability to place facilities in direct competition with Developer indicate that the State has not chosen the most extreme approach, as suggested by opponents. Rather, the State has, consistent with its concerns for public safety, implemented requirements which require direct installation to occur once, and to require only one construction entity to perform the work.

Several parties stated that the State, by granting Developer exclusive physical access, has selected the most restrictive alternative and therefore failed to meet the necessity standard set forth in New England. The Telco Opponents continue to ignore the very real fact that the most restrictive alternative is no longitudinal access for any entity. That has been MnDOT's policy until the time of issuing the RFP. It will be MnDOT's policy again if the State is not permitted to restrict the number of construction opportunities and the number of firms simultaneously engaging in construction and maintenance activities. Exhibit 1 (Affidavit of Denn). This state requirement allows multiple entities to locate fiber facilities in a single construction effort coordinated and maintained by a single firm. This is not the most restrictive alternative.

Lastly, Telco Opponents note that the requirement is not necessary because it was created with an intent to obtain a free share of lit and dark fiber. See e.g., Comments of Midwest; Opposition of NCTA.

Prior to 1989, neither the State of Minnesota nor any other state permitted longitudinal placement of utilities on freeway rights-of-way. The purpose of this prohibition was integrally related to FHWA and AASHTO's concerns for the safety and convenience of the traveling public. Exhibit 2 (Durgin Rebuttal Affidavit). This history is important in the context of the State decision because even after 1989, the State's Utility Accommodation Policy was not utilized to allow for longitudinal placement.[14]

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[14] State did grant access to AT&T for longitudinal placement but not as a result of its traditional right-of-way management authority. Rather, access was mandated by legislative action opposed

(Footnote Continued On Next Page.)

In 1995, the Minnesota Department of Transportation began to explore the possibility of longitudinal fiber placement on its freeway rights-of-way. At the time the RFP was drafted in the fall of 1995, there was no federal law requirement regarding Section 253 and thus, no explanation of this self-evident public safety rationale was included in the RFP.[15] Instead, the RFP focused on the State's concurrent decision to obtain fair compensation for use of its rights-of-way. To assert that public safety concerns are a "post hoc" defense in light of the history of prohibition of longitudinal utility placements and the caution with which Minnesota proceeded after the FHWA ban was lifted, simply defied logic. Rather than being a "post hoc" issue, public safety concerns were a starting point in the discussion of whether or not to allow longitudinal utility placement.

The State was moving from a position of no access to its current position of limited one-time access and did not do so lightly. The barter was the result of a decision to allow for fiber development to occur on a limited basis, so as to minimize disruption on freeway rights-of-way and to obtain fair compensation for that use. The State's intent in opening its freeway right-of-way cannot be disassociated with its safety concerns. The State's decision to allow longitudinal placement was a decision to veer from its previous public safety concerns under which the State had foreclosed the opportunity for longitudinal placement. In doing so, it decided to allow for limited one-time entry to minimize disruption to freeway rights-of-way, thereby minimizing risks to the safety of the traveling public and transportation workers. The fact that the State decided to obtain value for use of the freeway is not evidence of a lack of necessity to restrict the frequency and manner of right-of-way construction activity. Realizing the objectives of the State's compensation and protection of public safety are not mutually exclusive.

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by the Minnesota Department of Transportation because of concerns regarding public safety and convenience. Exhibit 2 (Durgin Rebuttal Affidavit).

[15] The RFP was issued on February 20, 1996, only two weeks after President Clinton signed the Telecommunications Act of 1996.

For almost 40 years, the State's transportation officials have found it necessary to prohibit longitudinal placement of utility facilities. To decide that it will allow a one-time installation for a period of ten years continues to meet the requirement of necessity.

2. The State requirement is competitively neutral.

Several of the Telco Opponents argue that the requirement favors Developer, has a disparate impact, and thus is not competitively neutral. Comments of Midwest, Opposition of MTA, p. 51.

This is not the appropriate analysis. When there is a determination that public safety requires a limitation on physical access to a single entity for a single placement opportunity, Section 253(b) requires an analysis if that legitimate public safety requirement treats all telecommunications providers fairly.

This claim of a per se violation of competitive neutrality based on a disparate impact test lacks a factual basis. The State issued an RFP in February, 1996 and every entity had an opportunity to respond. In fact, one key opponent, MFS, proposed in partnership with MEANS which is owned by 61 members of the MTA. The fact that these entities did not propose the project with the successful proposal indicates the neutrality of the procurement. No entity was "favored" or "chosen" in the sense inferred by the Telco Opponents.[16] The State used competitively neutral guidelines to determine the entity that obtained access. The fact that Developer offered the most favorable proposal is precisely what neutralizes it in any competitive sense. Exhibit 4 (Pearce Rebuttal Affidavit). If another entity felt the value was greater than offered by Developer, it would have made the offer. Both MTA and MFS oppose the State's use of an RFP process to assure competitive neutrality. The MTA and MFS, at a loss to describe why such a process was not competitively neutral, claimed that the State's initial decision to seek a one-time access opportunity was flawed:

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[16] See Comments of MCCA; and Midwest.

> As discussed above even if there is a finite limit to the number of separate cable which can be laid in the right-of-way, and a clear safety need to control the construction and maintenance traffic, the State has not established these considerations justify the prohibition on competition. The real world answer is not none or one, it is some number more than one.

MTA Opposition, p.52.

MTA does not dispute that once this choice has been made that an RFP assures competitive neutrality. Rather, MTA argues that the safety concern does not justify a prohibition on competition. Moreover, there is no prohibition that limits fiber installation to one entity as is suggested. The Agreement provides for multiple entrants, just as recommended by the MTA, but somehow this is not satisfactory to them. However, it should be sufficient for the Commission to realize that the ability of multiple entrants to utilize the freeway rights-of way through a one-time placement opportunity extending over a three year construction period is a neutral means of assuring that more than a single entity will utilize the freeway rights-of-way. The fact that Developer is currently negotiating with potential collocators, and the need of collocators to make for a feasible project, makes collocation a very real alternative.

USWC argues that the RFP process is irrelevant and it is the Agreement itself which is not competitively neutral. GTE argues that competitive neutrality should be read broadly so as to assure every current and future competitor the same opportunity to place fiber in the future as Developer and collocators. Telco Opponents argue that because a competitor may not be able to or desire to time its investment at the time the trench will be open, these providers are not treated in the same manner as Developer and other entities that choose to collocate facilities. The opponents assert that the Act prohibits barriers against any telecommunications provider and thus any carrier that is denied access is not treated in a competitively neutral manner.[17]

These arguments start from a false premise that the State must open its freeway rights-of-way for the convenience of telecommunications entities. However, the State clearly has the

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[17] See Comments of the Minnesota Cable Communications Association, Comments of KMC; Comments of Nextlink; Comments of TCG.

ability, due to public safety concerns, to restrict the frequency of construction activity on the freeway rights-of-way. Any entity that did not wish to place fiber at that time, or that did not exist, does not have a right under Section 253(b)'s competitive neutrality principle to force the State to open its rights-of-way at whatever time meets its investment plans. The Commission recognized in its local competition order, for example, that collocation opportunities at LEC switches would not be available to every future entrant as a result of capacity restraints. This fact did not violate the competitive neutrality and non-discrimination requirements of ILECs under Section 251. The Telco Opponents have turned the reserved police power rights of the states on its head, essentially creating a right, even where a legitimate and necessary public safety restriction has been identified, to nullify that restriction if it has any temporal aspect.[18] The State requirement does not favor any particular entity or group of entities because all entities have the right to collocate facilities. In addition, future entrants will have the ability to purchase their own dark fibers rather than simply leasing lit wholesale capacity. Thus, the notion that entrants without current demand who do not yet exist will lose the opportunity to acquire dark fiber along these rights-of-way is simply incorrect. If market circumstances affect the desirability of an entity's decision to utilize the right-of-way when opened, this does not make for a non-neutral requirement. Rather, it is the ordinary course of events in a competitive market that drive this result.

Because the State requirement articulated a legitimate public safety concern which necessitates limitations on timing and coordination of opening the trench along freeway rights-of way, its use of an RFP to determine the entity with exclusive physical access and the requirement

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[18] To the extent these arguments attempt to distinguish timing of the State's authority to require a particular construction schedule from Developer's authority, they are misplaced. The State requirement imposes the duty on Developer to begin construction and complete it within a certain time frame. To the extent collocators want to negotiate timing within those state-imposed constraints, they will be well positioned to do so.